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In The

Supreme Court of the United States

October Term, 1992

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

v.

ALPINE RIDGE GROUP, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT ALPINE'S BRIEF ON THE MERITS

WARREN J. DAHEIM
Counsel of Record
DONALD W. HANFORD

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM
2200 First Interstate Plaza
P.O. Box 1157
Tacoma, WA 98401
(206) 572-5050
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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In addition to the matters relied on by petitioners, the Court is referred to 24 C.F.R. 880.102, 880.103, 880.108, 880.110(b) and (d), and 880.125(e), all as originally published (April 29, 1975) (Appendix E); and 24 C.F.R. 888 in its entirety (Appendix D).

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a key financial provision of "bargained for agreements for which plaintiffs [paid] independent consideration."[1] The agreements included an express provision "pledging the full faith and credit of the United States."[2] Private lenders, and bond rating agencies, accepted the agreements as security for loans made to plaintiffs to fulfill their obligations under the agreements.[3]

In the trial court, HUD conceded that Section 801 of the 1989 HUD Reform Act substantially impaired the financial provisions of plaintiffs' agreements. Based on HUD's concession, the trial court found:

> HUD does not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights.[4]

On appeal to the Ninth Circuit, HUD did not challenge the trial court's finding. Accordingly, the Ninth Circuit observed:

> HUD does not dispute that Section 801 substantially impairs the owner's exercise of these property rights.[5]

Now, for the first time, HUD challenges the trial court's findings on this important issue. As the centerpiece of its brief, HUD argues:

> Section 801 does not work a substantial impairment of that [contract] right.[6]

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[1] Pet. for Cert. p. 26a.

[2] Pet. for Cert. p. 27a.

[3] See typical security agreement (J.A. 7) and HUD comfort letter in a Section 8 bond financing transaction (J.A. 12.)

[4] Pet. for Cert. p. 27a.

[5] Pet. for Cert. p. 12a.

[6] Pet. Brief p. 13.

HUD's attempt to now raise the issue of "substantial impairment" is deplorable. Unfortunately, HUD appears incapable of appreciating the importance of proper procedure.[7] HUD prefers instead to corrupt procedures through euphemisms and fictions. A brief comparison of the respective positions of the parties[8] will highlight some of those fictions.[9]

1. The Fact – HUD Reneges On Its Contracts

In 1974 the Ford Administration hit on a plan for the private sector to take over the government's job of housing the poor. Under what is known as the Section 8 new construction program,[10] HUD induced private developers to sign long-term contracts to build, own, operate and maintain specialized rental housing for the elderly, handicapped, and poor at specific locations selected by HUD. For the developers it was a high risk program to perform a government function (housing the poor) with the incentive for profit and the risk of loss.

A principal inducement to the developers was HUD's election, by contract, of "formula" rent adjustments to keep pace with the hyper-inflation of the

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[7] HUD also raises the issue of "ripeness" (Pet. Brief p. 34, n.33). That issue was decided against HUD in the trial court, but was not appealed to the Ninth Circuit. See also n.137 *infra*.

[8] Plaintiffs' statements are based on the affidavits of Dean Chaussee (J.A. 25), and Warren J. Daheim (R. 18), the declarations of Jona Goldrich (J.A. 36) and Janet Marie (J.A. 52), and the various regulations, handbook provisions, and other materials contained in the Appendix to this brief and *Alpine's* brief in opposition to the Pet. for Cert. Those affidavits and declarations have never been challenged.

[9] It is impossible in the space allotted to comment on every one of HUD's misstatements. As Emerson said: "Their every truth is not quite true . . . so that every word they say chagrins us and we know not where to begin to set them right."

[10] 42 U.S.C. 1437f. The statute covers a number of programs. The only one at issue here is the program for developers to build or substantially rehabilitate housing for the poor.

1970s.[11] The adjustments were to be automatic, open (published in the Federal Register), objective (based on rent movement factors), and uniform (treating all projects in the same area equally). The process was to be immune from bureaucratic whim. In the trial court, HUD did not dispute that plaintiffs would not have entered into Section 8 contracts without the provision.

In 1981, under budgetary pressures, HUD attempted to renege on its election in an effort to save money. On an "ad hoc and capricious basis",[12] HUD refused to grant the "automatic" adjustments which its own factors indicated were due. Instead, HUD proceeded to cut (not cap) *existing* rents, in many cases cutting below the amount necessary to pay operating expenses.

When challenged, HUD claimed it was only carrying out a statutory mandate to keep Section 8 rents in line with market rents. HUD claimed the right to implement the mandate in any manner it chose, overriding its election by contract of formula rent adjustments. In *Rainier View Associates v. United States*,[13] the Ninth Circuit held the statutory mandate must be carried out, as it had been from the beginning, *within the framework* of HUD's contractual election of a formula method of rent adjustment.

After *Rainier View*, HUD ran to Congress to "bail it out." Congress obliged, since the temptation to save money was irresistible. It passed Section 801 of the HUD Reform Act, which "fixed" *Rainier View* by requiring owners to accept 30¢ on the dollar for past rent adjustments wrongfully withheld and nonformula rent

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[11] In 1971, President Nixon imposed wage and price controls. In 1975, President Ford promoted the WIN program (Whip Inflation Now).

[12] H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987).

[13] 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). See Appendix A, *Alpine's* Brief in Opp. to Pet. for Cert.

adjustments in the future. This case challenges Congress' attempt to abrogate the owners' contract right to formula rent adjustments.

2. The Fable – HUD And The Public Fisc

To mask its conduct, HUD creates a fable. HUD's legal arguments are based entirely on the fable.[14]

In the fable, greedy landlords attack the public fisc seeking a "windfall"[15] through "above market"[16] rents. HUD defends the fisc, armed with a statutory mandate. The Ninth Circuit intrudes, commanding HUD to lay down its mandate. Rendered defenseless, HUD turns to Congress for relief. Congress ends the controversy by generously putting the ungrateful landlords "in a better financial position than their contracts guaranteed."[17] The fable ends with Congress having restored a "smooth and effective operation of the Section 8 program."[18]

The fable is just that – a fable. It is fiction, not fact. The fable is belied by the undisputed record.

The first fiction is that the Section 8 new construction program was designed to provide "prevailing market rents."[19] The fact is the Section 8 new construction program was designed to produce housing that the market had not and would not produce.[20] Since the housing was not "market" housing, rents were not "market" rents.

The next fiction is that plaintiffs are making or seeking a windfall profit. This fiction, and in turn all of

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[14] An amicus brief filed by the AFL-CIO relies on the same fable.

[15] See e.g., Pet. Brief pp. 14, 38, 40.

[16] See e.g., Pet. Brief pp. 14, 39.

[17] Pet. Brief p. 30.

[18] Pet. Brief p. 41.

[19] Pet. Brief p. 3.

[20] Chaussee Aff. (J.A. pp. 30-34).

HUD's arguments, are based on the results of a process described as "farcical."[21] The fact is there is no evidence whatsoever of any profit, much less windfall profit. The fact is, as the district court found:

> Plaintiffs have demonstrated great hardship. Some plaintiffs have foregone all return on their investment; others have no money for necessary repairs; and still others are now teetering on the brink of foreclosure.[22]

The next fiction is that HUD is a law-abiding agency frustrated in its attempt to carry out a statutory mandate. The fact is that HUD is an agency run amok, repeatedly chastised by Congress for cutting rents in disregard of congressional intent,[23] and by the district court for ignoring direct orders to clean up its rent adjustment process.[24]

---

[21] Appendix A. The trial court in *Rainier View* found that defects in the process were so egregious that HUD's comparability studies violated procedural due process. See Order Jan. 15, 1986. Reproduced in *United States v. Rainier View Associates*, Pet. for a Writ of Cert. at 16a, 30a (1988).

[22] Order denying defendant's motion for stay pending appeal (*Alpine* Clerk's Record, No. 111).

[23] H.R. Rep. No. 122, 100th Cong., 1st Session (1987) (Appendix H).

[24] *Rainier View Associates*, CR-83-997R, orders dated January 11, 1986; December 24, 1987 ("In ruling as it does, this Court feels compelled to point out that it is HUD's behavior in this case which makes injunctive relief imperative. Although HUD has not openly defied the Court, it has done absolutely nothing to comply with the Court's rulings until confronted with a direct court order. Even then, HUD has chosen to comply in only the most narrow way possible to avoid a contempt citation."); April 15, 1988 ("The parties are now back again, largely because the government appears incapable of comprehending and obeying the Court's injunctive orders. . . . Perhaps the Court lacks imagination; certainly it failed to conjure up all the possible linguistic loopholes which the government has sought to exploit. Indeed, the Court simply assumed the government would comply in good faith with its statutory and contractual obligations to make annual rental adjustments on all Section 8 projects."); April 16, 1991 ("This is not the first time that HUD, despite adverse judicial rulings, has been reluctant to fulfill its contractual obligations.") (Appendix D to Pet. for Cert.).

The next fiction is that the Ninth Circuit prevented HUD from exercising its mandate. The fact is the Ninth Circuit simply held that the mandate must be exercised, as it had been from the beginning, within the framework of HUD's contract election of a formula method of rent adjustment.

The final fiction is that the owners should be grateful for whatever HUD deigns to give them, regardless of their contracts. Underlying this fiction is HUD's repeated claim that Section 8 is a social welfare (i.e., gratuity) program[25] for owners. The fact is that owners committed to long-term "bargained-for" agreements for which they paid valuable consideration – they "built and maintained low-income housing in accordance with HUD's requirements."[26] Their reward for participating in a risky social program is to be accused of seeking a windfall profit.

B. Counterstatement Of Facts

It is critical for the Court to understand the background and purposes of the Section 8 new construction program, HUD's representations, the parties' mutual understanding, the practical operation of the rent adjustment process, and what HUD was actually doing under the guise of "comparability."[27] Without such understanding, it is easy to fall for HUD's fable.

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[25] Pet. Brief pp. 14, 37, 40, 43.

[26] Pet. for Cert. 53a.

[27] The undisputed record supports plaintiffs' counterstatement of facts. See n.8 *supra*.

1. Section 236 – A Disaster

Section 236 was the predecessor to Section 8 as a low income housing program. Section 236 combined federal mortgage insurance with subsidized interest payments to mortgagees (lenders) in order to reduce the mortgagor's (owner's) monthly mortgage payment. The benefits of the reduced interest payments were to be realized by the tenants of the project in the form of lower rents.

Under a regulatory agreement, Section 236 rents were regulated and annual rent adjustments were made by local HUD employees on a *project-by-project* basis according to operating costs. The project-by-project rent adjustment system was an administrative nightmare, expensive to process and time-consuming for both HUD and the developer. The system often worked on a selective and arbitrary basis, exhibiting favoritism or retribution depending on which employee administered an adjustment and which owner made the request. Rejected and delayed rent adjustments resulted in deferred maintenance, cuts in services, vacancies, and defaulted mortgages. Since the mortgages were government insured, developers simply walked away from the projects, leaving HUD to foreclose.[28] In 1974 HUD formed a special task force to deal with defaults under Section 236 and make appropriate recommendations to HUD.

2. The Section 8 Program

> The Committee has accepted the essence of HUD's recommendation which is to give private developers the incentive for profit and the risk of loss in the construction and management of housing development for low income families.
>
> S. Rep. No. 693, 93d Cong., 2d Sess. (1974) *reprinted in* 1974 U.S. Code Cong. & Admin. News 4273, 4314.

[28] Some of the problems with the predecessor programs were described in the House Report accompanying enactment of Section 8 (see H.R. Rep. No. 93-1114, p. 21).

The Section 8 program was enacted in 1974 to resolve the crisis created by the failure of previous programs – particularly Section 236. It was to be simple:

> Q. You were trying to make it simple?
>
> A. Yes . . . [29]

The new program was specifically designed to avoid the problems owners had with Section 236 by using a formula rent adjustment method and not a project-by-project method:

> "And therefore, what they wanted to do is set it up in such a way so that the rents would be adjusted using a rent formula, but that they did not want to get into a staff intensiveness by doing a project-by-project rent determination."[30]

Under Section 8, HUD solicited private developers to submit proposals to design, construct, and operate specialized housing for the elderly, handicapped and poor in specific locations selected by HUD. If a developer's proposal was selected, HUD and the developer negotiated a Housing Assistant Payment (HAP) contract. Under the HAP contract, rents were agreed upon in an amount high enough to induce the developer to sign a contract and participate in the program, with rents to be adjusted annually for inflation.[31] The developer was to collect a portion of the rent (30% of the tenant's income) directly from the tenant.[32] The

[29] Testimony of James Tahash, head of HUD Program Planning Division (See J.A. 28-29).

[30] Ibid.

[31] See discussion pp. 13-17.

[32] Adjustments in rents do not affect the amount of rent the tenant pays, which is based solely on a percentage of the tenant's income. See Comment Fed. Reg. May 1, 1991, p. 20083.

remainder of the rent was to be paid by HUD to the developer, either directly or through a local public housing agency as the contract administrator. HUD regulations contemplated that the developer would pledge the contract to a private lender to obtain financing.[33] The owner and his lender would take all of the risks with no guarantee against loss but with the possibility of making a profit if successful.

HUD aggressively solicited developers and lenders, directly and through HUD sponsored seminars, to convince them that this risky program would be free from the defects of Section 236. The representations made by HUD, and the resulting expectations of the owners, are the keys to understanding this case.

(a) ***Negotiated rents***. The first key to understanding this case is to recognize how the parties arrived at initial contract rents. HUD claims the Section 8 new construction program "was clearly designed to provide prevailing market rents."[34] This statement is false.[35] The falsehood is critical because it permeates HUD's misdescription of the new construction program.[36]

Initial rents under the new construction program were *not* market rents. Initial rents were *negotiated* rents, based on the costs of construction. Initial rents

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[33] See 24 C.F.R. 880.125(e) (Appendix E) (use of contact as security for financing).

[34] Pet. Brief, p. 39.

[35] HUD confuses the new construction program and the existing housing program. Under the existing housing program, rents are market rents since the housing was built as market housing (not under the Section 8 program) and formerly rented as such. There is no reason, other than HUD red tape, why existing housing should rent for more simply because it is rented to low income tenants.

[36] See e.g. Pet. Brief p. 3 ("bring the owners total rental income up to the prevailing market level"); p. 14 ("a contract that was never intended to pay above-market rent"); p. 39 ("The Section 8 program was clearly designed to provide prevailing market rents").

were not market rents for the simple reason that there was no comparable rental housing. Indeed, the sole purpose of the new construction program was to produce rental housing that the market had not produced.[37] The market had not produced the desired rental housing because there were no tenants willing and *able* to pay the rents necessary to justify the construction of specialized housing at the locations selected by HUD.

Since "market" rents did not exist for the locations HUD selected, HUD came up with an artificial concept of "Fair Market Rent." This term was defined by regulation as those rents "required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design . . . ".[38]

Since newly constructed rental housing of similar design and amenities did not exist at the locations specified by HUD, Fair Market Rent came to be based on costs. These costs generally exceeded "market" costs by over 50%, due to HUD's special construction requirements and Davis Bacon wage rates. As a result, Fair Market Rent, and the companion requirement that rents be "reasonable,"[39] were interpreted by HUD as justifying the rents necessary to make the projects

---

[37] HUD regulations provided that "New construction projects shall be permitted only where . . . HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing . . . [to] meet the needs of eligible families." 24 C.F.R. 880.103 (April 29, 1975) (Appendix E).

[38] 24 C.F.R. 880.102 (April 29, 1975) (Appendix E). HUD claims that initial rents were not to exceed "prevailing market rents" by more than 20%. (Pet. Brief p. 3). That statement is false. Initial rents were not to exceed "Fair Market Rent," by more than 20%. Fair Market Rent is an artificial concept, as shown above.

[39] 24 C.F.R. 880.108 (April 29, 1975). (Appendix E).

financially feasible.[40] Otherwise, the program would not have gotten off the ground.

For example,[41] in 1979 HUD advertised for proposals to build housing for the elderly in Puyallup, Washington, a town with a population of less than 30,000. Retirement housing already existed in Puyallup, but rented for $800 to $900 a month, which was far too much for a senior citizen trying to live on a $600 monthly social security check. As a result, many of Puyallup's elderly lived in substandard housing. They simply could not afford to pay for decent housing close to transportation and medical and community services.

In response to HUD's invitation, Ray Dally, a local builder, submitted a proposal. His proposal was to build 25 one bedroom apartments in a three-story, brick, elevatored building. It would have a mechanical core, elevator machinery room, elevator shaft, elevator lobbies on each floor, extra wide interior hallways and stairways with handrails down both sides of the stairs and halls, social hall, handicapped restrooms and an entry security system which was remote controlled by each individual resident from his own apartment. Each apartment had an emergency call light, bathroom grab bars, smoke detectors and automatic fire alarms. The project was near downtown, on expensive land, close to transportation, medical and community services. With a view of Mt. Rainier, it was to be named "Rainier View."

Dally's proposal was accepted. Dally and HUD agreed by contract that the initial rents for an apartment would be $315 a month. The contract was pledged by Dally to a local bank to secure conventional financing for the project. From the viewpoint of Dally and his bank, the contract rent of $315 was required to justify

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[40] Chaussee Aff. (J.A. 33).

[41] Taken from the record in *Rainier View.*

Dally's high cost of building and financing a specialized building under HUD regulations.

The rent of $315 was also agreeable to HUD, even though recently constructed one bedroom apartments in Puyallup rented for $200. Nonetheless, HUD internally determined that the Dally rents were "reasonable" in light of HUD's special requirements and the uniqueness of the project. There would be nothing like Rainier View in the City of Puyallup, except for retirement housing which rented for two or three times the Rainier View rent. Certainly the wood frame walk-up apartments in the area which rented for $200 were not comparable.

In any event, HUD *agreed* to the original rents. In doing so, HUD interpreted its authority under the Act to justify the rents which were necessary to make the project financially feasible and induce Dally to build. In no sense were those rents "market" rents. They did, however, establish a *relationship* to the market. HUD *guaranteed* that that relationship would be preserved.[42]

(b) ***Automatic annual rent adjustments***. The second key to understanding this case is to recognize how rents were to be adjusted. To attract the private sector to the Section 8 program it was necessary to insure that rents would be periodically adjusted to keep pace with inflation. That meant that the *relationship* of the initial rents to the market would be preserved.

For example, Ray Dally's original rents were $315 due to the uniqueness of the Rainier View project. At the same time, new walk-up apartments in the area rented for $200. Ten years later, if the $200 rent had increased by 50% to $300, Dally's $315 rent was to have increased 50% to $472.50. Only in that way could Dally be assured of receiving a return on his investment proportionate to what he would have received had HUD not induced him to enter the Section 8 program.

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[42] See discussion *infra* pp. 15-16.

The Section 8 statute provided two ways to make periodic rent adjustments.[43] One way was by market surveys. The other way was by use of a reasonable formula. Whichever way was selected, the adjustments were to reflect rent movement in the non-assisted market.[44]

To attract the private sector, and to carry out the twin mandates of the statute (select an adjustment method, and make sure it accurately measures inflation),[45] HUD adopted regulations[46] and prepared contracts which used a *formula method* of rent adjustment. Section 1.9 of the standard HAP contract provides:

> b. *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
>
> (2) On each anniversary date of the contract, the Contract Rents *shall* be adjusted by applying the applicable *automatic* annual adjustment factor most recently *published* by the government.

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[43] See Section 8(c)(2)(A) (Appendix B).

[44] See Section 8(c)(2)(C) (Appendix B).

[45] The owners were not expecting "excessive rent adjustments" (Pet. Brief p. 4). But they did reasonably expect that the relationship of their rents to the market would be maintained by published factors. They also reasonably expected to make a profit if they did a good job of operating their apartments. Receiving what one party fairly contracted to pay and the other fairly contracted to receive is not a windfall. See *United Firefighters v. Los Angeles*, 259 Cal. Rpt. 65, 70 (Cal. App. Dist. 1989).

[46] 24 C.F.R. 880.110 (April 29, 1975) (Appendix E.)

* * *

> d. *Overall Limitation.* Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; ***provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.***

The two provisions (published automatic annual adjustments and overall limitation) must be read together and harmonized. Taken alone, the provision for automatic annual adjustments gives little guide to the basis for selecting factors.[47] The overall limitation supplies that basis. It directs that the factors selected by HUD shall maintain, without increasing or decreasing, the *relationship* between the initial rents and market rents. The italicized language of the overall limitation clause *guarantees* that the *relationship* will

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[47] In 1983 HUD seized on this fact in an attempt to justify basing factors on changes in operating costs, rather than changes in market rents. The attempt was dropped after sharp criticism from Chairman Gonzales of the House Subcommittee on Housing: See *Section 8 Rent Adjustments, Elderly Housing and Other Assisted Housing Issues: Hearing Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs*, 98th Congress 2d Sess. (1984). HUD now singles out a comment made at that hearing by a private attorney, takes the comment out of context, and claims that it supports HUD's post 1981 interpretation (Pet. Brief p. 24). All that the witness meant (counsel of record was there and also testified) was that rent adjustments were to be based on market movement, not operating costs as HUD was then proposing.

be preserved.[48] In other words, the factors should measure the *movement* in market rents and adjust rents accordingly, thereby preserving the original relationship. This is exactly how HUD interpreted and administered the rent adjustment process until 1981.

In the course of administering these two provisions, HUD annually selected Automatic Annual Adjustment Factors ("AAAFs") based on the *movement* of rents in selected geographic areas, and published those factors and the basis for their selection in the Federal Register. The factors were percentages, required by regulation to be applied against current rents to produce the new rents. For example, if the rental movement factor is 5% and the current rents are $350 per month, the adjusted rents for the following year would be 105% of $350, or $367 per month.

The process was open (published), objective (based on rent movement factors), and uniform (treating all projects in the same area equally). It was the direct opposite of the subjective, secret, complex and time-consuming process of Section 236.

HUD's original understanding of the program was described by a number of HUD officials. Lynn Stowell, a HUD Director of Housing testified:

> "Q. The automatic adjustment process, the way you understand it, was basically an inflation hedge, was it not?
>
> A. Yes.
>
> Q. And that was the way it was explained to developers and lenders?
>
> A. Yes.
>
> Q. I am not trying to put words in your mouth, but so that if market rents went up

[48] Since the initial relationship was expressly protected, "material" differences would automatically be avoided so long as the factors selected by HUD mirrored inflation in market rents.

> 15%, you would expect contract rents to go up 15%?
>
> A. Yes."[49]

(c) ***Full faith and credit.*** The third key to understanding this case is to recognize the nature of the promise made by the government. As a final inducement to attract owners and lenders to invest in Section 8 housing, HUD inserted language in the contracts typical of government bonds, solemnly pledging the full faith and credit of the federal government:

> 1.6 Government Assurances To Owner. The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and that funds have been obligated by the government for such payments.[50]

Based on these assurances, hundreds of lenders and developers in the private sector entered into Section 8 contracts and constructed thousands of housing units in the locations selected by HUD. The program ran smoothly from 1974 to 1981. Each year, HUD designated the geographical areas, selected the factors, and adjusted rents to maintain the initial relationship between Section 8 and market rents.[51]

[49] See *Rainier View*, Excerpts of Record 64.

[50] Aff. of Warren J. Daheim, Ex. A, par. 1.6 (R.18).

[51] HUD complains that some geographical areas are broad and that the factors cannot protect against economic variations within those areas. Of course this ignores the fact that *HUD selects the geographical areas.* The fact that some areas are broad reflects a conscious choice by HUD, which was to HUD's benefit. For example, by combining high and low inflation areas in calculating a single factor, HUD was able to use a lower average factor than justified for a large number of projects. HUD would benefit if most of the projects were in the high inflation area. Taking the example cited by HUD (Pet. Brief, p. 17, n.13) projects in Southern California were arguably paid too little and projects in Eastern Washington were arguably paid too much. Since there are many more

The process can be traced through HUD regulations, handbooks, and detailed written methodologies. It started with factors developed by the economic analysis arm of HUD using rental market information derived from the CPI, the American Housing Survey, and from "any other data sources or market analysis."[52] As early as 1976 (the first year that adjustment factors were published), HUD recognized that a more refined procedure was necessary and asked the public for suggestions.[53] As a result, HUD regulations were revised in 1977 to provide that HUD field offices would make factor revisions where local conditions warranted.[54] As revised, 24 C.F.R. 888.202 reads as follows:

> Schedule C Adjustment Factors will be published in the Federal Register at least annually. Interim revisions may be published as market conditions indicate. *In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors* (revisions italicized).[55]

HUD handbooks were amended to provide detailed procedures for HUD field offices to revise the factors if they were either too high or too low.

Section 8 projects in Southern California than there are in Eastern Washington, HUD obviously lumped them together to reduce rent increases overall.

[52] *Alpine* Brief in Opp. to Cert., Appendix B and C. Even different time periods were used in calculating "inflation for the San Francisco and Anchorage SMSAs . . . to avoid questionable short-term fluctuations in the CPI indexes for those areas." (Appendix B). This statement alone belies HUD's argument that it paid little attention in calculating its own factors.

[53] Fed. Reg. Nov. 8, 1976, p. 4944 (See Appendix F).

[54] Fed. Reg. Nov. 25, 1977, p. 60508 (Appendix F).

[55] See 24 C.F.R. 888.202 (Appendix D).

> Pursuant to Section 880.110(d),[56] [the overall limitation] the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3).[57]

In light of the above history, HUD's statement that it did nothing until "the early 1980s"[58] to enforce comparability is simply false.

3. HUD Reneges On Its Contract

In 1981, as inflation drove Section 8 rents higher and federal housing budgets became smaller, some HUD offices took it upon themselves to ignore the automatic annual rent adjustment process. Instead of comparing the *movement* of rents and translating it into factors, certain offices started to recompare projects, invariably concluding that the Section 8 rents were "excessive."[59] Instead of a system which maintained the original relationship and moved rents upward or downward according to market conditions, HUD attempted

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[56] See 24 C.F.R. 880.110 (Appendix E). The regulation was changed in late 1979 to apply to contracts executed later. As changed, it is designated 24 C.F.R. 880.609 (see Pet. Brief p. 6a).

[57] HUD Handbook May, 1978 (Appendix G).

[58] Pet. Brief p. 6. Factors may also be revised under 24 C.F.R. 888.204 (Appendix D) on request by the owner. Interestingly, HUD recently argued in another case that the *only* method for *owners* to enforce comparability was to seek a factor adjustment under 24 C.F.R. 888.204. That is exactly plaintiffs' argument, only in reverse. Apparently what is good for owners is not good enough for HUD. See *Park Village Apartments v. U.S.*, 25 Cl. Ct. 729 (1992).

[59] See Pet. Brief p. 6. Neither the statute nor the contract refer to "excessive" rents. The mandate is to keep rents in line with market rents. That means that the original relationship of Section 8 and market rents is to be maintained.

to destroy the original relationship. The purpose of the process changed from maintaining the relative value of the original rents to undercutting that value.[60]

To the extent that chaos can be called process, the process began with untrained HUD clerks (not appraisers) calling around to see if they could find any "comparable" rents that were lower than the Section 8 project arbitrarily selected for review. Of course, they always did, even if they had to "compare" a downtown high-rise Section 8 project for the elderly with a dilapidated walk-up apartment on the edge of town.[61]

By "recomparing" projects, HUD undermined the original relationship between the Section 8 project and the market, in direct violation of its written promise. It was as if original rents had never been agreed upon. Invariably, HUD's new process resulted in rent adjustments lower than those based on the *movement* of rents. In many cases the new process was used not only to deny increases, but to substantially *cut* existing rents, regardless of the impact on the owner.[62]

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[60] HUD's true purpose is revealed in recent directions to field offices processing retroactive rent payments under the law at issue in this case. HUD stated:

> "Before calculating the amount of any retroactive payment, the PHA, if directed by HUD, will review whether rents were excessive when initially set." Fed. Reg. May 1, 1991, p. 20086.

This direction reveals HUD's mind set. First, rents were not "set" by HUD, they were agreed upon between HUD and the developer. Second, HUD is expressly prohibited by the overall limitation from revisiting its original agreement on rents. The developer relied on those rents in making his decision to proceed with the project. Both parties must live with their bargain.

[61] For an example of such comparisons, see the photographs in Appendix A. The process was described by an independent MAI appraiser as "farcical." HUD used the comparison to *cut* existing rents on the Section 8 apartments from $487 to $354 per month.

[62] H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987) (Appendix H); and see p. 6 *infra*.

All of this was done without regulations, handbooks, or any other guidelines.[63] The reports of trained appraisers challenging HUD's "comparability" studies were ignored. If hearings were allowed, neither the owner nor his representative were allowed to ask questions. Normally the HUD official who cut the rents made the determination whether or not he would undo his own handiwork.[64]

To illustrate, if Dally's rents should have gone to $472.50 based on market movement, they were instead *reduced* to $375 by "comparing" his well located brick high rise apartments with two story wooden walk up apartments on the edge of town. This destroyed the original relationship of Dally's apartments to the market. Worse yet, the objective rent system Dally had bargained for was now replaced by a subjective system vulnerable to bureaucratic whims of favoritism or retribution. Instead of being able to rely on uniform published factors open to public scrutiny, evenly applied to all, Dally was subjected to back room manipulations of rent which he originally had been assured went out with the discredited Section 236 program.

4. The *Rainier View* Case

Shortly after HUD began cutting rents, the plaintiffs in *Rainier View* filed suit challenging HUD's actions. HUD justified its rent cutting by reference to the "overall limitation" clause. HUD now saw this clause not as a limitation on the selection and modification of the factors and geographic areas, but as an

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[63] On page 6 of its brief, HUD describes a process that HUD tried to implement in 1986 in response to early rulings in *Rainier View*. It was followed only sporadically. See memo from Council of State Housing Agencies, October 26, 1987 (copy lodged with Clerk). What was really happening was described in a stipulation of the parties in *Rainier View* (copy lodged with Clerk).

[64] From record in *Rainier View*. See also Appendix A.

independent rent adjustment method.[65] HUD had yet to invent its two-tiered or "capping" argument, an argument which cannot explain *cutting* existing rents.

After a thorough review of the statute, the regulations, and the contracts, all in context, the Ninth Circuit ruled that the contract *unambiguously* requires HUD to use the formula rent adjustment method. It held that HUD had elected by contract the formula method over a market survey method and could not circumvent that election under the pretext of keeping assisted rents in line with market rents. The court held that HUD was required to keep "assisted rents in line with market rents"[66] within the framework of the rent adjustment method HUD wrote into the contract, just as it had for seven years before the budget crisis in 1981.

5. HUD's Response

HUD represented to the Ninth Circuit,[67] and announced to Section 8 owners throughout the Ninth Circuit,[68] that it would acquiesce in the *Rainier View* decision and commence making full adjustment factor payments. Instead, HUD proceeded to ask Congress for authority to do precisely what the Ninth Circuit had ruled it could not do; that is, repudiate its contractual election to use a formula method of rent adjustment. HUD submitted legislation to Congress which would

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[65] For statement of the issue as framed by HUD see n.93 *infra* and related text.

[66] *Rainier View v. United States*, 848 F.2d at 991.

[67] See p. 3 of HUD's Petition for Limited Rehearing Case Nos. 88-3630, 88-3841.

[68] See HUD memorandum of May, 1989 (attached to plaintiffs' complaint).

overturn the *Rainier View* ruling, retroactively and prospectively.[69]

6. Congress' Response

> The Department of Housing and Urban Development (HUD) may have quietly dug itself out of a potentially expensive hole last week, engineering a resolution to a dispute with low-income housing developers that could save the department as much as $800 million.
>
> *Washington Post*, December 1, 1989.

On November 22, 1989,[70] Congress passed H.R. 1, entitled "Department of Housing and Urban Development Reform Act of 1989" (the "Bill").[71] The Bill deals with a number of HUD abuses reported in the press during the summer and fall of 1989.

Tacked on at the end of the Bill was Section 801, entitled "annual adjustment factors for Section 8 rents." The essence of Section 801 is that Section 8 owners who were victimized by HUD's comparability process are to be further victimized. Owners affected by HUD's comparability process are forced to accept 30¢ on the dollar for monies past due under their contracts.[72] In addition, Section 801 authorizes project by project comparability studies, directly contrary to the contracts. In short, Section 801 permits HUD to do exactly what the Ninth Circuit held was not permitted

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[69] Secretary Kemp introduced the HUD Reform Bill on October 30, 1989. Cong. Rec. H 9685 (Nov. 21, 1989). Section 801 of the Bill addresses the *Rainier View* litigation. See Cong. Rec. S. 16601 (Nov. 21, 1989).

[70] See Housing Development Reporter, November 27, 1989, p. 506.

[71] Pub. L. No. 101-235.

[72] Technically, the Bill provides for factors to be applied only to that portion of contract rent which exceeds debt service (mortgage payments), but no less than 30% of the full factors applied to full contracts rents. For most owners the "30% solution" would be the best of two bad choices.

under HUD's Section 8 contracts.[73] The purpose of the amendment was to "fix" Rainier View and thereby save money.[74]

7. The Decision Below

Plaintiffs challenged Section 801 asking: "does Congress have the power to abrogate the government's bargained-for financial contracts in order to save money?"

The Ninth Circuit held that Congress did not have such power. The court held that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the Fifth Amendment."[75]

The court pointed out that plaintiffs' contract rights were "supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934) and *Perry v. United States*, 294 U.S. 330 (1935)." The court distinguished the "sovereign powers" doctrine (which does not apply to bargained-for financial contracts), and curative legislation cases (which cure faulty interpretations of statutes, not contracts), and rejected HUD's claim that some rational basis for the legislation existed other than to save money.

SUMMARY OF ARGUMENT

Plaintiffs have a contract right to formula rent adjustments. That right is not overriden, nullified, or "trumped" by HUD's statutory mandate to keep Section 8 rents in line with market rents. The mandate was incorporated into plaintiffs' contracts and means that

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[73] Senator D'Amato, one of the Bill's sponsors, stated: "In addition, the legislation addresses a controversial ruling in the Ninth Circuit relating to the *Rainier View* case." Cong. Rec. S 16601 (Nov. 21, 1989).

[74] See discussion pp. 47-50 *infra*.

[75] Pet. for Cert. p. 14a.

the relationship between Section 8 rents and market rents both must and *will* be maintained.

Plaintiffs' claim is that the relationship must be maintained, as it was from the beginning, within the framework of HUD's contractual election to use a formula method of rent adjustments. Plaintiffs' interpretation should be preferred over the interpretation which HUD, the drafter of the contract, seized upon in 1981 in order to save money. Plaintiffs' interpretation is supported by the background and purposes of the Section 8 program, both parties' original understanding, the actual administration of the program, HUD regulations, and ordinary rules of contract interpretation. Statements by congressmen, thirteen years after the program was adopted, have no bearing on the interpretation of contracts executed between HUD and project owners under the program.

Section 801 of the HUD Reform Act substantially impairs plaintiffs' contract right to formula rent adjustments. HUD conceded this issue in the trial court, did not raise it on appeal to the Ninth Circuit, and cannot raise it here. Moreover, HUD's arguments are based on the fiction that what HUD calls "comparability" was in fact a study of rent movement by qualified appraisers using proper appraisal techniques. That fiction is refuted by the undisputed record.

Section 801 cannot be justified under either the doctrine of sovereign power or the doctrine of curative legislation. Neither doctrine applies to plaintiffs' contracts, which admittedly are bargained-for financial agreements for which plaintiffs paid independent consideration.

Section 801 also cannot be justified by its purpose, which is to save money. The other rationales given (i.e., to fix *Rainier View* and restore uniformity to rent adjustments) do not survive rational analysis, much less the heightened scrutiny required when the government attempts to change its own financial contracts.

ARGUMENT

In the trial court, HUD agreed that there were four elements in analyzing the constitutionality of Section 801.[76]

A. Plaintiffs Have Contract Rights To Formula Rent Adjustments

1. Plaintiffs' Position

Under Section 8, Congress directed HUD to make periodic rent adjustments on the basis of either (1) changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units, or . . . (2) on the basis of a reasonable formula.[77] Congress further directed that whatever method HUD chose, it should not result in material differences from rents charged for "comparable unassisted units."[78] In other words, the adjustments should not overstate or understate the movement of rents in the area.

To induce the private sector to use Section 8, and to avoid costly and complicated procedures, HUD elected the formula alternative. The contract provides that HUD will select factors, the basis of which is published in the Federal Register, to be applied "automatically" and evenly to all projects in an area.[79] To insure that

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[76] Pet. for Cert., p. 19a. In this Court HUD adopts a slightly different analysis, suggested by *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985). However, that case did not involve the government's own contracts. Accordingly, the scrutiny there is less searching, and there was no need to analyze the sovereign power (i.e., vested rights) doctrine.

[77] Section 8(c)(2)(A) (Appendix B).

[78] Section 8(a)(2)(C) (Appendix B).

[79] b. *Automatic Annual Adjustments.*
(1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
(2) On each anniversary date of the contract, the Contract Rents *shall* be adjusted by applying the applicable *automatic* annual adjustment factor most recently published by the government.

the factors did not overstate or understate rent movement, HUD inserted a provision in the contracts similar to its statutory analog:

> d. *Overall Limitation.* Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; ***provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.***

The overall limitation language of the contract should not be interpreted to make a mockery of HUD's election of a formula (i.e., factor) method of rent adjustment, which measures market movement of rents and is published in the Federal Register. To be consistent with the statutory and contractual framework, HUD should select, monitor and modify its factors based on market surveys which measure market movement of rents. HUD should not be allowed to abandon its own factors[80] and adjust rents on the basis of a project-by-project survey, which does not attempt to measure the market movement of rents and is unpublished.

Plaintiffs' interpretation should be preferred over the interpretation which HUD, the drafter of the

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[80] Provisos are qualifiers, not nullifiers. *See Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D.P. 1966). Provisos are to be strictly construed. See Sutherland, Statutory Construction § 47.08 at p. 135.

contract, adopted in 1981 in order to save money. See Restatement, Second, Contracts § 207, Comments. *See also, United States v. Seckinger,* 397 U.S. 203, 216 (1970):

> " . . . the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the government's vast economic resources and stronger bargaining position in contract negotiations."[81]

Plaintiffs' interpretation is also supported by general rules of contract interpretation.[82] HUD's belated interpretation is not.

(a) The intention of the parties controls. In interpreting a contract "the avowed purpose and primary function of the court is the ascertainment of the intention of the parties."[83] Here, the original intention of all the parties was the same. The process was to be simple and automatic. Only later did HUD come up with a different interpretation, as a pretext for cutting rents.

In any event, the meaning given to the language by owners and lenders is controlling because that is the meaning that HUD induced the owners and lenders to understand and act upon. See, *Corbin on Contracts* § 538, at p. 63:

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[81] HUD claims that its interpretation is entitled to deference (Pet. Brief p. 26, n.24), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843. But that case involved an agency's interpretation of a statute, not a contract. The distinction was noted in *Clay Tower Apartments v. Kemp,* 978 F.2d 478, 480 (9th Cir. 1992).

[82] The first rule of interpretation is that the meaning of words can almost never be "plain" except in a context. *Restatement, Second, Contracts* § 212, Comment b. That would include the history and purposes of the Act, the understanding of the parties, and the administration of the contracts. All are undisputed and support plaintiffs' interpretation.

[83] *Williston on Contracts* 3rd Ed. § 601 at p. 303. *United States v. Seckinger,* 397 U.S. 203, 208 (1970).

> . . . the court should give much less weight to what it thinks the party who used the words actually meant than to what it is convinced that the other party actually understood them to mean, provided that the first [party] knew or had reason to know that the second party did so understand them.

Here, HUD clearly knew that owners and lenders were relying on the "automatic" nature of the rent adjustment process.[84]

(b) Contracts should be interpreted to advance the party's principal purposes.[85] Here, the purpose of the formula rent adjustment process selected by HUD was clear. The purpose was to make rent adjustments simple and thereby induce owners to rely on the simplicity, uniformity and objectivity of the process.

The interpretation of plaintiffs is simple. It gives effect to the intention of the parties. The interpretation HUD proposes is not simple. It is uncertain, time-consuming and expensive. It is at least as complex as the rent adjustment system of the failed Section 236 program. Yet that is exactly where HUD would have the Section 8 program return, as demonstrated by the regulations HUD recently promulgated under Section 801. If an owner wishes to avoid harassment by "comparability," he can give up his contract right to "automatic"

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[84] In addition to the testimony of HUD officials cited earlier, and other evidence, a HUD Task Force in 1978 described the reliance of owners and lenders. In discussing proposed revisions to the formula rent adjustment process for future contracts the Task Force acknowledged that owners and lenders had relied on the process and that to change to a project-by-project rent analysis would be: "a disincentive to uninsured lending by conventional lenders and state agencies, who have been reassured by the present automatic rent adjustment process." See Appellees/Cross-Appellants' opening brief in *Rainier View,* p. 9 (copy lodged with Clerk).

[85] *Corbin On Contracts,* § 545, p. 160.

adjustments and return to the previously discredited Section 236 "budgeted rent increase method."[86]

(c) An interpretation that gives meaning to the entire Agreement is favored over one that makes some part of it mere surplusage.[87] Plaintiffs' interpretation makes sense of the entire contract. HUD's interpretation gives no weight to the words "automatic" or "shall" and totally disregards the protection afforded owners by the requirement of publication.[88]

(d) One economic function of contract law is to reduce the complexity and hence the cost of transactions.[89] Plaintiffs contracted for factors, published in the Federal Register, together with the basis for their determination, applied "automatically" and evenly to all projects in the area selected by HUD. The process was simple and involved no cost to the owner and minimal cost to HUD.

HUD's project-by-project comparability process is complex, time-consuming, and expensive. HUD must find and hire qualified appraisers at a cost of $1,000 to $3,000 per project appraisal.[90] The owner must hire an appraiser to challenge HUD's appraisal, and probably a

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[86] Fed. Reg. Oct. 29, 1992 at p. 49126.

[87] See *Farnsworth, Contracts* p. 516 (2nd Ed. 1990).

[88] This requirement does not guarantee that HUD will make good decisions. But by exposing those decisions, and their basis, to public scrutiny, the odds are that HUD will give more thought to its decisions. Moreover, those decisions can be more easily tested. For those reasons, some states, by constitution, provide for the publication of legal decisions. See Wash. Const. Art. 4, § 21. Lawyers above all should be sensitive to the importance of that process.

[89] See *R. Posner, Economic Analysis of Law* p. 69 (2nd Ed. 1977).

[90] See Council of State Housing Agencies Oct. 26, 1987 (copy lodged with Clerk). Moreover, the cost and complexity would be even more aggravated if either party could "trump" the factors. See n.106 *infra*.

lawyer to guide him through the process. Some appreciation for the costs involved can be had by reviewing the process described in Appendix A.[91]

(e) A court should avoid an interpretation which puts one party from being in a position of economic servility and completely at the mercy of the other.[92] HUD's interpretation would leave plaintiffs at the mercy of minor HUD officials. Owners and lenders had been assured that would not happen.

2. HUD'S Position

HUD started with only one argument to justify its rent cutting. The argument was at least straightforward and honest, although wrong. HUD simply claimed that the language of the overall limitation provision unambiguously allowed HUD "to make individualized rent adjustments after, and separately from, those calculated pursuant to a formula based on automatic adjustment factors."[93]

HUD claimed the court should defer to HUD's interpretation of its own contracts because HUD was a government agency. In other words, HUD's interpretation should prevail regardless of the context, the other provisions of the contract, the background and purposes of the Act, the original intention of the parties, HUD's own regulations, and ordinary rules of contract interpretation. For HUD, all of these matters were irrelevant.[94]

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[91] HUD argues that comparability will likely not be imposed on all owners. This is little solace to the owner who is selected for comparability and must go through the time-consuming and costly process. HUD hopes, of course, that owners will not challenge the process because of the enormous costs involved.

[92] See *Farnsworth, Contracts* p. 548 (2nd Ed. 1990).

[93] *Rainier View,* Appellees' Brief p. 1 (copy lodged with Clerk).

[94] Stripped of fictions and euphemisms, HUD's only argument is still that the overall limitation, read in a vacuum, supports HUD's posi-

The Ninth Circuit disagreed. Noting that HUD did not dispute any of the material facts presented by plaintiffs, the court ruled that the contract *unambiguously* required HUD to use the formula rent adjustment method. The court held that "the overall limitation provision, consistent with its statutory analog . . . is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments."[95]

Having lost with its honest argument, HUD manufactured new arguments, and invented facts, attempting to improve its position. The process has been continual, starting with HUD's petition for rehearing en banc in *Rainier View*.

HUD's petition for rehearing en banc moved away from the argument that the overall limitation authorized HUD to use a project-by-project market survey method *independently* of the formula method. As it does now, HUD argued for a "two-step process" beginning with a "general," "presumptive," "threshold" formula adjustment, with the project-by-project market survey method as a "cap" on the formula adjustment. This new fiction was invented by HUD's lawyers after the loss before the panel. The original argument at least was honest and recognized how the project-by-project method was actually being used. This new fiction implies that the project-by-project method is used merely to *limit* or "cap" the rent increase otherwise required by the formula. In fact, HUD used the project-by-project method to *lower* the rents which were in effect before the scheduled adjustment.[96] HUD's project-by-project method does not "cap" anything. *It*

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tion. In light of the undisputed record, this is the only position HUD can take.

[95] *Rainier View v. United States*, 848 F.2d at 991.

[96] The fiction is further exposed by Section 801, which recognizes that some owners did not dare to ask for formula rent adjustments for fear that their existing rents would be *cut*. Sec. 801(a)(1)(B).

nullifies not only the current formula adjustment, but also formula adjustments from prior years.

HUD's newly invented "two-step process" would make no sense even if HUD were not lowering rents. While at the same time HUD says the formula method and project-by-project method are complimentary, it also says that the project-by-project method "overrides" the formula method. As the en banc court understood, HUD's two-step process is really nothing more than a one-step process which selectively substitutes a project-by-project rent adjustment method for the formula rent adjustment method elected by HUD in the contract. If HUD's comparability studies were truly an auditing process to see if the formula was accurate, the results would be used to revise the formula, not to replace it with an entirely different system.

HUD next accused the Ninth Circuit of confusing two different "market survey" methods.[97] HUD said this confusion led the Ninth Circuit to incorrectly conclude that HUD's project-by-project method would nullify HUD's election of the formula method. This is a *non sequitur*. If a market survey method, of whatever kind, is used *instead of* the formula method, the market survey method obviously has the effect of nullifying the formula method.[98]

HUD also argued in its en banc petition, as it does here, that the formula method is not nullified because

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[97] The panel was not confused. It merely recognized that "changes in the fair market rentals in the housing area" constituted an alternative to the formula method under the statute, and that HUD's project-by-project method *could have* been elected pursuant to the first alternative. The fact that the statute permitted other market survey methods as well is irrelevant. The crucial fact is that HUD elected the formula method and not a market survey method or a combination of methods.

[98] HUD gets caught up in its own semantics. In effect, HUD admits that the factor method is nullified by saying the individual comparability method "overrides" the factor method (Pet. Brief p. 13). "Override" and "nullify" are synonymous. *Random House Thesaurus College Ed.* 1987, p. 487-88.

the formula is used if the project-by-project method produces a higher rent or if no individual market study is performed at all. Once again, HUD's argument does not follow. This case is not about owners who get their formula adjustments. It is about those who do not get their formula adjustments because HUD used a different method. *For them,* the formula method is certainly nullified.

HUD also argued in its en banc petition, and argues here, that the statute is silent on the manner in which it should exercise its mandate to keep Section 8 rents in line with market rents. HUD is correct. The statute is silent. The point is that when HUD elected a formula method by contract the silence ended.[99] The contract did determine how improper adjustments were to be avoided – by monitoring and adjusting the factors and geographical areas.

Finally, HUD argued in its en banc petition, and argues here, that the *Rainier View* decision "conflicts with the language and purpose of HUD's own regulation, ignores the agency's more relevant comparability rule, and contradicts the agency's long-held interpretation of its powers."[100] This argument denies reality: (a) HUD signed a stipulation in *Rainier View* that the factor adjustment method was the only rent adjustment method prior to 1981;[101] (b) prior to 1981, HUD's regulations and handbook interpreted the overall limitation to require factor adjustments for local variations,[102] and (c) HUD's reinterpretation of the overall limitation

[99] Deference to HUD's interpretation of its own *contracts* is not proper. See n.81 *supra* and text discussion.

[100] Pet. Brief p. 28.

[101] See Stipulation (copy lodged with Clerk).

[102] See discussion *supra* pp. 17-19.

in 1981 completely changed HUD's administration of Section 8 rent adjustments.[103]

3. Lower Court Decisions

HUD relies on a Claims Court decision, and two district court decisions which followed the Claims Court, as reasons for reversing *Rainier View.*[104] The principal problem is that these cases attempt to "interpret" the statute and contract in a vacuum, without knowing the background of the Section 8 program, without knowing the assurances given by HUD to induce the private sector to assume the risks of participation, and without knowing HUD's administration of the program before 1981. As a result, these decisions embark on a purely semantic exercise entirely divorced from the context in which the statute was enacted and the contracts were signed.[105] Under such unreal circumstances, HUD's fable proved effective.

Some of the major mistakes made by these decisions are:

- They deferred to HUD's interpretation of its own contracts.
- They ignored the background and purposes of the program.
- They ignored the original intention of the parties.
- They ignored HUD's own handbook, regulations and methodologies.

[103] HUD's "long-standing" interpretation (from 1974 to 1981) was the same as that of the *Rainier View* court and plaintiffs. HUD's deference argument, even if relevant, works against HUD. See n.81.

[104] Pet. Brief p. 16, n.11.

[105] A person can read the words of any contract and jump to the conclusion that they have but one reasonable meaning and that he knows what it is. But "a better understanding of the uncertainties of language and a study of cases in the field of interpretation, will make one beware of holding an opinion so recklessly arrived at." *Corbin on Contracts* § 535 p. 18.

- They ignored HUD's administration of the program from 1974 to 1981.
- They didn't have a clue as to what HUD was actually doing under the guise of comparability. They did not understand that HUD's so-called comparability studies were "farcical" and to use those studies to establish "windfalls" is just as farcical.
- They were under the misconception that Section 8 was a "market rent" program.
- They misunderstood how and why original rents were established.
- They thought it made no difference whether rents were adjusted by a formula method or a project-by-project comparability method.
- They, like HUD, dismissed the importance of publishing factors and the basis for arriving at factors when this was the owners' protection against abuse.
- They did not understand that instead of a windfall profit, owners have been going broke.

In summary, these lower court decisions relied on by HUD are wrong because they are based on HUD's fable.[106] Whose fault this is, is not important. What is important is that this Court base its decision on the undisputed record.

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[106] In a subsequent case, the Claims Court held that owners can also insist on individual comparability, despite HUD's argument that the proper remedy is to ask for factor adjustments. *See Park Village Apartments v. U.S.*, 25 Cl. Ct. 729 (1992). Under that decision the process goes from unwieldy to impossible, with each of the nation's 15,000 projects individually able to "trump" the factor adjustments. The "free-for-all" which would ensue demonstrates the unreasonableness of the Claims Court earlier decision.

4. Ratification By Congress

HUD claims Congress ratified HUD's interpretation of the statute in 1987.[107] HUD's argument might be relevant if this case turned on the interpretation of a statute. It does not. This case turns on the interpretation of a contract, a contract which was authorized by a statute. It is not "within the purview of Congress' power to engage in contract interpretation."[108]

B. Plaintiffs' Contract Rights Are Vested

To induce developers and lenders to invest in Section 8 housing, HUD inserted typical bond language into its contracts, solemnly pledging the full faith of the federal government. Owners and lenders relied on this guaranty when financing and building Section 8 projects.[109] In most cases, the contract was assigned to a lender as security for private financing, the terms of

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[107] Pet. Brief p. 22. What actually happened was that in 1987, because of HUD's "ad hoc and capricious" rent cuts, Congress amended the statute to disallow rent cutting. Congress said that it never intended for cuts to be made in the absence of the publication of negative factors (exactly plaintiffs' position). (See Appendix H). Congress repeated itself in 1988 because of HUD's "convoluted and tortuous" interpretation of the earlier law. Congress said: "Nothing could be more convoluted and tortuous than HUD's interpretation of the . . . 1987 Act, which resulted in a denial of the policy established by that Act." Public Law 100-628 (Nov. 7, 1988) (H. Rep. 100-741)

[108] Pet. for Cert. p. 11a. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 431 (1980) ("it is not the province of Congress to judge the persuasiveness of the opinions of federal courts.") *See also, United States v. Klein*, 13 Wall 128, 20 L.Ed. 519 (1871) (prescribing a rule of decision in a case pending before the courts in a manner that required the court to decide a controversy in the government's favor, held to be unconstitutional). *See also, Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) n.13 ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

[109] See Affidavit of Dean Chaussee, (J.A. 32).

which were approved by HUD.[110] Even Standard & Poors viewed the contracts as "rateable security" for bonds.[111]

HUD now argues its solemn contract obligations are meaningless. HUD claims "Congress has authority to legislate prospectively with respect to the administration of government contracts."[112] Such authority supposedly derives from the government's "sovereign power," which "is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[113] In other words, according to HUD, no government contract is worth the paper on which it is written.

HUD's argument is wrong. Congress of course can amend or repeal a statute at any time. It does not follow that existing contracts executed under authority of that statute can be so easily changed. The government's contracts cannot be changed, retroactively or prospectively, by a statutory change unless: (a) the contract so provides; or (b) the government exercises its war power, emergency police power, or other paramount power;[114] or (c) the "sovereign power" (also known as the "reserved power") doctrine is applicable. Here, the contracts do not provide the unilateral right of amendment. Nor has the government invoked its war power or emergency police power. Finally, the "reserved power"

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[110] See typical form of assignment as security (J.A. 70). The assignments were approved in writing by HUD (J.A. 7). See par. 2.11 of Exhibit B to Affidavit of Warren J. Daheim. See also 24 C.F.R. § 880.125(e) (Appendix E).

[111] Financing for Section 8, Journal of Housing, September 1977, p. 448.

[112] Pet. Brief p. 32.

[113] Pet. Brief p. 32.

[114] See *Larionoff v. United States*, 533 F.2d 1167, 1179 (D.C. Cir. 1976).

doctrine does not apply to "bargained for *contract rights* supported by independent consideration."[115]

To support its "reserved power" argument, HUD relies primarily on the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986).[116] In *Bowen*, the state of California and several of its public agencies challenged Congress' attempt to deprive them of their contractual right to terminate their participation in the Social Security system. The Supreme Court rejected the state's due process argument since the statute on which plaintiffs' agreements were based expressly reserved the power of alteration, amendment, or repeal. In addition, the agreements

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[115] Pet. for Cert. p. 10a. That is not to say that Congress can make no changes in the Section 8 program which would be binding on owners under existing HAP contracts. The tenant's share of rent has been changed from 25% to 30% of his monthly income. Persons suffering from mental illness, AIDS, and alcoholism, are now eligible. Such changes impair the owner's contracts, but unlike Section 801 are not a frontal assault on HUD's financial obligations under the contracts. The distinction is discussed in *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 24-25 (1977) ("not every security provision, however, is necessarily financial").

[116] HUD also cites *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Federal Housing Admin. v. The Darlington Inc.*, 358 U.S. 84 (1958), *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and the *Sinking-Fund Cases*, 99 U.S. 700 (1879). *Merrion*, *Darlington*, and *General Motors* are cases in which the court declined to interpret contracts as containing implied provisions foreclosing the exercise of sovereign power. In none of those cases was the claim based on an explicit contractual provision, as it is here. *Sperry* does not involve the government's own contracts, and is clearly inapplicable. In the *Sinking-Fund Cases*, the government amended the charters of federally chartered railroad corporations under an express power of amendment reserved in the charters. It required railroads, as quasi-public entities, to set aside reserves to meet bond obligations. The government did not renege on a financial obligation to the railroads.

were not ones for which the state paid value and therefore were subject to an implied "reserved power" to amend.[117]

The Court in *Bowen* carefully restricted the "reserved power" doctrine to contracts involving benefits gratuitously conferred. The court clearly distinguished cases like *Lynch v. United States*, 292 U.S. 571 (1934) (an attempt to cancel insurance contracts between the federal government and private parties) and *Perry v. United States*, 294 U.S. 330 (1935) (an attempt to modify the provisions of government bonds). The court pointed out that those cases involved contracts supported by independent consideration.

Bowen bears no resemblance to the facts of this case. Neither the Section 8 statute, nor the HAP contracts, contain a power of amendment. A HAP contract is between HUD and a private party. Unlike *Bowen*, valuable consideration was given by the lenders and owners when they agreed to finance and build costly housing units for the poor in exchange for HUD's promise of a formula rent adjustment process free from bureaucratic whim.

In summary, there is a doctrine of reserved powers. However, "when a [sovereign] impairs the obligations of its own contract, the Reserved Powers Doctrine has a different basis." *United States Trust Company of New York v. State of New Jersey*, 431 U.S. 1, 23 (1977). "Whatever the propriety of a [sovereign] binding itself to a future course of conduct in other contexts, the power to enter into *effective* financial contracts cannot be questioned." *Id.*, 431 U.S. at 23-24 (emphasis added). As the Court said in *United States Trust Co.*:

> A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity. *Id.* 431 U.S. at 25, n.23.

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[117] The termination clause was not one "for which the state provided independent consideration." *Bowen* at p. 55.

In the present case, a financial obligation of the sovereign is involved. It would be an "absurdity" if the sovereign pledged its full faith and credit to honor that obligation while retaining the unilateral right to "deny or change the effect of" its promise. Under that reasoning, even treasury notes would be worthless.

C. Section 801 Substantially Impairs A Vested Contract Right

Not every impairment of a vested contract right is unconstitutional. The impairment must be substantial.[118]

In the trial court, plaintiffs submitted affidavits from a number of owners to establish both the retroactive and prospective impact of Section 801.[119] HUD has never before challenged the fact that Section 801 had a substantial impact on plaintiffs.[120] HUD's Petition for a Writ of Certiorari boldly asserts the decision of this

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[118] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 27 (1977); *National R.R. Passenger Corp. v. Atchison, T.&S.F.R.R.*, 470 U.S. 451, 472 (1985). In *United States Trust Co. v. New Jersey*, a lengthy trial was held at which both parties presented witnesses and other evidence on the impact of a change which affected the security for bonds issued by a public port authority.

[119] Attached to Aff. of Warren J. Daheim (R.18) (see excerpts Appendix J).

[120] See discussion pp. 2-3 *supra*. The fact is undisputed that owners would not have signed contracts and lenders would not have loaned money against those contracts if Section 801 had been in existence. See Aff. of Chaussee (J.A. 25-35); Declaration of Goldrich (J.A. 36-43); and letters of owners attached to Aff. of Warren J. Daheim (R. 18). That is the central issue in cases dealing with the impact of legislation on existing contracts. *See El Paso v. Simmons*, 379 U.S. 497, 514 (1965) ("The promise of reinstatement . . . was not the central undertaking of the seller nor the primary consideration for the buyer's undertakings"); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) ("They have taken from the mortgage the quality of an acceptable investment for a rational investor").

Court is "of great programmatic importance,"[121] affecting over 15,000 contracts nationwide, and involving 50 million dollars in the Ninth Circuit and over one billion dollars nationwide.[122]

HUD now claims that the impact of Section 801 is "minimal,"[123] and that owners retain the "lion's share"[124] of rent and the "core economic features of their bargain."[125] HUD even says that Section 801 puts the owners in a "better financial position."[126]

Not only are HUD's arguments made too late, but they are specious. They are based on the fiction that what HUD calls "comparability" was a study of rent movement by qualified appraisers using proper appraisal techniques.[127] This fiction is refuted by the undisputed record.

1. Retroactive Impact

> "At the Crystal Palace Aquarium not long ago, I saw a crab euthanatising a sickly fish, doubtless from the highest motives."
>
> 46 The Spectator 241 (1873)

HUD has the temerity to say that Section 801 puts owners "in a better financial position than their contracts guaranteed."[128] But plaintiffs' contracts guaranteed

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121 Pet. for Cert. p. 22.

122 Pet. for Cert. p. 23.

123 Pet. Brief p. 35. This Court does not decide questions not raised in the lower court. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

124 Pet. Brief p. 29, n.26.

125 Pet. Brief p. 43.

126 Pet. Brief p. 30

127 In addition, HUD dismisses the importance of publication, which is the owner's shield against arbitrary actions. See n.88 *supra*.

128 Ibid.

full factor adjustments. Section 801 gives owners only 30% of what they are due under their contracts.[129]

HUD's argument is that its capricious studies were valid and that HUD's only error was in not converting the results of those studies into published factors. HUD argues that since under Section 801 the affected owners will get 30% more than they would have gotten if HUD's studies had been "folded"[130] into factors, the owners are receiving a windfall.

HUD's argument is dishonest and is contradicted by the undisputed record. The example shown in Appendix A is illustrative. HUD compared a seven story elevatored Section 8 apartment located in the heart of downtown Tacoma with wood frame walk up apartments located on the edge of town. Not only was the comparison "farcical,"[131] it did not even purport to measure the *movement* of rents. Instead of studying how much rents had moved in the wood frame apartments over a period of time and applying that percentage to the Section 8 rents, HUD compared the two projects and arbitrarily concluded that the Section 8 rents were too high. HUD then cut those rents from $487 per month to $354, notwithstanding the fact rents for the wood frame apartments had actually increased over the previous year.

HUD's comparison cannot be "folded" into factors because it was not a measurement of rent movement in the market. In short, the premise of HUD's argument is as "farcical" as the studies on which the argument was based. HUD's suggestion that the *Rainer View* court could simply have remanded to the agency[132] for adjustment of factors based on studies which did not measure market movement and violated elementary standards

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129 See n.72 *supra*.

130 Pet. Brief, p. 34, n.33.

131 Appendix A.

132 Pet. Brief p. 31, n.28.

of procedural due process (see n.21 *supra*) is preposterous.

2. Prospective Impact

Section 801 authorized HUD to establish modified annual adjustment factors (MAAFs) for geographic areas smaller than those covered by the AAAFs. Those factors are to be based on comparability studies measuring the movement of market rents.[133]. *Rainier View* held that HUD already had this authority.[134]

Section 801 also authorizes HUD to apply "an alternative methodology for conducting comparability studies" in the event MAAFs cannot be established.[135]

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[133] HUD argues (n.32) that the statute "also responds to owners' complaints about HUD's methodology." That is false. HUD confuses the methodology for modified annual adjustment factors, provided for in Section 801, with the methodology for doing project-by-project comparability. The owners' complaints were that project-by-project comparability did not measure market movement and the results were not published. Section 801 responds to neither complaint.

[134] Since the legislation was drafted by HUD, it shows how ignorant HUD's national office is of its own regulations and procedures. Since 1977 HUD field offices have been authorized and *directed* to establish modified annual adjustment factors for geographic areas smaller than those covered by the AAAFs. See discussion, pp. 18-19, *supra*.

[135] HUD claims (n.30) that it would be "prohibitively expensive to collect highly localized CPI data or to survey areas not covered by CPI data to determine comparable rents." Yet HUD already establishes FMRs each year for approximately 2,750 areas (Fed. Reg. October 29, 1992, p. 49122). All HUD would have to do is measure the percentage change in FMRs from one year to the next to establish AAAFs. In addition, HUD has instructed owners that they can avoid individualized comparability under Section 801 by changing their contracts to go back to the discredited Section 236 budgeted method of annual rent adjustment. Fed. Reg. October 29, 1992, p. 49126. That procedure would entail individual processing for 15,000 projects, if all owners succumbed to HUD's threat. How that is simpler than spot checking on market movement and publishing modified factors is a mystery (the latter is the system suggested by HUD counsel by opinion letter of Aug. 28, 1980) (see Appellees/Cross-Appellants' opening brief in *Rainer View* p. 24) (copy lodged with Clerk).

This provision is intended to authorize HUD to adjust rents based on the type of comparability studies condemned in *Rainier View*.[136] These studies recompare projects instead of measuring the movement of rents. The results, and their basis, are unpublished and closely guarded.

Plaintiffs commenced their action challenging the constitutionality of Section 801 on its face [137] as violative of their contract rights to published factor rent adjustments. If Section 801 stands, Congress will have unilaterally amended plaintiffs' contracts to permit the unpublished, individualized recomparing of rents as a substitute for the published factor method measuring market movement. It is an understatement to say that this change is substantial.

HUD responds by arguing: (a) that rent adjustment procedures can never be protected by the Fifth Amendment; and (b) the impact of the "alternate methodology" is "minimal" since theoretically individual comparability will produce the same results as the factors. HUD is wrong on both counts.

In support of its first argument, HUD relies on *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).[138] In that case, a utility challenged a change in the State's rate making methodology. No contract was involved. The court simply held that "no single rate making

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[136] "The committee did not share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies." Cong.Rec. 16600 (Nov. 21, 1989).

[137] In the trial court, HUD claimed that the prospective application of Section 801 was not "ripe" because regulations had not been issued. HUD lost on that issue and did not appeal it to the Ninth Circuit. The issue is raised here by HUD, but is buried in a footnote (n.33). The issue should not be considered. If it is, the Court is referred to the trial court's decision for discussion of the issue (Pet. Cert. p. 18a). Space limitations prohibit further discussion.

[138] *See also, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). (A federal law limiting tort claims was held constitutional.)

methodology is mandated by the Constitution."[139] Plaintiffs agree. However, the methodology of rent adjustments in this case is mandated by plaintiffs' contracts. Changing the methodology substantially changes the contract, which is a violation of the Constitution.

HUD's second argument is again dishonest. HUD argues that the impact of Section 801 is minimal since comparability theoretically could produce the same result as the factor method.[140] This argument relies on the hope that the reader will be unable to understand the difference in the two concepts.

Since the two concepts are not attempting to do the same thing, the results will never be the same. The factor method attempts to keep initial contact rents parallel and proportionate to the movement of rents in the local market. As explained earlier,[141] HUD's version of comparability aims to remeasure and defeat the initial relationship of contract rents to the market. One is a principled and objective attempt to keep contract rents even with rental inflation in the area. The other is an attempt to save money by a subjective reanalysis of the rents originally agreed upon.[142]

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[139] 488 U.S. 299, 317.

[140] See Pet. Brief p. 35, n.34 (No substantial impact because the net economic outcome is the same).

[141] See pp. 19-21 *supra*.

[142] HUD argues (n.15) that the contract provision protecting the "initial difference" protects against this result. If the initial difference was viewed as establishing a relationship to the market, HUD's argument might make some sense. But HUD now claims that the initial difference is to be measured in original dollars. (Fed. Reg. Oct. 29, 1992, p. 49125). This is itself an admission that HUD is undermining the initial difference because it denies an inflation adjustment for those dollars. In any event, the recomparing of projects does undo the original agreement on rents by analyzing and revaluing the individual features of each project.

D. The Purpose of Section 801 Is To Save Money

Where the legislature passes a law impairing its own contracts, a "careful examination of . . . [its] motive and purpose is required."[143] There is a "strong bias" against such legislation.[144] Deference to a legislative assessment of reasonableness and necessity is not appropriate because the [government's] self-interest is at stake.[145] This Court is not barred by the government's self-serving declarations,[146] but is "under solemn duty . . . to look at the substance of things whenever it enters upon the inquiry whether the legislature has transcended the limits of its authority."[147]

The purpose of Section 801 is obvious. It was proposed by HUD to "fix" the *Rainer View* case. As Secretary Kemp stated, its purpose "is to minimize HUD's liability under the Ninth Circuit's *Rainier View* ruling."[148] A review of comments by sponsors of the Bill confirms that purpose.[149] As Senator Sasser, Chairman of the Budget Committee stated:

> I would like to . . . clarify the intent of the legislation with respect to Section 801 . . .
>
> [B]y moving quickly to enact this legislation with its *Rainier View* "fix," we could save the

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[143] *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 245 (1978). HUD concedes the application of this more rigorous standard of review. (Pet. Brief pp. 35-36). However, HUD goes on to argue on the basis of the "arbitrary and irrational" standard appropriate for private contracts.

[144] *Nowak on Constitutional Law* (1983), p. 477.

[145] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412, n.14 (1983). As the court said, "In almost every case, the Supreme Court has held a governmental unit to its contractual obligations when it enters financial or other markets."

[146] *Larinoff v. United States*, 533 F.2d 1167, 1180 (D.C. Cir. 1976).

[147] *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

[148] See letter of Secretary Kemp, Cong. Rec. H9688 (Nov. 21, 1989).

[149] See excerpts from Cong. Rec. (Appendix I).

> Government hundreds of millions, if not more than a billion dollars.[150]

Realizing that the impairment of contracts "to save money" is unconstitutional,[151] HUD offered a number of other justifications to the trial courts, all of which were found to be "illusory."[152] Having failed a reality check in the lower courts, HUD now limits its rationales and cleverly rephrases them. As rephrased to this Court, HUD's rationale is that:

> Section 801 constitutes an intricate adjustment of the payment provisions in a comprehensively regulated low-income housing program. The statute eliminates the unforeseen obstacle that *Rainer View* had put in the way of Congress' original policy and restores uniformity to the program's operation.[153]

HUD's rationale is classic double-talk. Section 801 does not constitute "an intricate adjustment of the payment provisions in a comprehensively regulated low income housing program." It emasculates a critical provision of a bargained for agreement for which plaintiffs paid valuable consideration. The statute does not "eliminate the unforeseen obstacle that *Rainer View* had put in the way of Congress' original policy." By "fixing" *Rainier View*, it attempts to overrule a judicial

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150 Ibid.

151 See e.g. *Lynch v. United States*, 292 U.S. 571, 580 (1934); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Bowen v. Public Agencies Opposed to Social Security Employment*, 477 U.S. 41, 55 (1986).

152 Pet. for Cert. p. 59a.

153 Pet. Brief p. 45. HUD bounces around and sometimes seems to suggest other rationales. However, the rationale quoted appears to be the one on which HUD has finally decided to light. The reader is referred to the lower court opinions which discuss various other HUD rationales. Pet. for Cert. p. 15a-30a, 40a-60a.

interpretation of a contract.[154] Section 801 does not "restore uniformity to the program's operation," because it authorizes the capriciousness of project-by-project comparability. Uniformity could be achieved by HUD simply living up to its contracts. As the *Acacia* trial court said: "The government cannot justify application of the studies on the ground that it seeks to apply them more equitably where the government had no right to apply them at all."[155]

To penetrate HUD's double-talk, a useful divining rod should be the "duck test."[156] HUD asked for the legislation to save money.[157] Congress said that it passed the legislation to save money.[158] The direct

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154 HUD also attempts to cast Section 801 as "curative" legislation. Of course, unliquidated claims, not based on contract, can be resolved by Congress. The cases cited by HUD support that proposition, but nothing more. *See General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992) (court found that there was no contractual right to the benefits claimed); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (statute requiring payment to U.S. of percentage of awards made by Iran-United States Tribunal – to pay for costs of Tribunal; did not involve the government's own contracts); *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989) (retroactive application of Act precluding anti-trust damages permitted as to unliquidated claims; did not involve vested contract rights); *Graham, Foster, v. Goodcell*, 282 U.S. 409 (1931) (a defect in the administration of the Internal Revenue Code can be cured by retroactive legislation; did not involve vested contract rights).

155 Pet. Cert. p. 59a. HUD also argues based on takings cases that the legislation is constitutional since Congress did not completely abrogate its contract (Pet. Brief p. 43). But that argument was dealt with under the "substantial impairment" section. Under that reasoning, the government could eliminate interest on treasury notes since the principal would still be payable.

156 If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck.

157 See letter of Secretary Kemp, Cong. Rec. H 9688 (Nov. 21, 1989) ("The practical effect of this agreement is to minimize HUD's liability under the Ninth Circuit's *Rainier View* ruling . . . ").

158 See Appendix I.

effect of the legislation is to save money. Obviously, the purpose was to save money.

CONCLUSION

Constitutional principle, and enlightened public interest, require that the government keep its promises when it enters the commercial world. As the Chairman of the House Subcommittee on Housing said of HUD in 1984:[159]

> If the Department persists, there will be no reason for any contractor to place any faith in the word of the government . . .
>
> Section 801 is unconstitutional.

Respectfully submitted,

WARREN J. DAHEIM
DONALD W. HANFORD

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[159] Hearing, House Subcommittee Housing, Feb. 1984, No. 98-71.

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APPENDIX A

JUDGE ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAINIER VIEW ASSOCIATES, a Washington limited partnership, and KURTIS R. MAYER and PAMELA MAYER, d/b/a MAYER BUILT HOMES, Plaintiffs, vs. UNITED STATES OF AMERICA, acting through the United States Dept. of Housing and Urban Development, and the HOUSING AUTHORITY OF THE CITY OF BREMERTON, Defendants.	NO. C 83-997R AFFIDAVIT OF DONALD W. HANFORD IN SUPPORT OF PLAINTIFFS' MOTION FOR SUPPLEMENTARY RELIEF

STATE OF WASHINGTON)
: ss.
County of Pierce)

DONALD W. HANFORD being first duly sworn on oath deposes and says:

1. Affiant is an attorney who has represented various Section 8 owners in connection with efforts by HUD to cut rents based on comparability analysis performed by HUD. Affiant is competent to

testify to the matters stated herein, and the same are stated on his personal knowledge.

2. Affiant represented Tacoma Partnership ("Owner"), the Owner of the 1400 Market Section 8 elderly project ("Project") in Tacoma, Washington, with respect to HUD's determination that the contract rents be reduced from $487 per month to $354 per month. The Project is a 7-story elevator building with 125 units. The rent decrease amounts to $199,500 per year.

3. A notice of appeal was filed with HUD requesting a hearing on the record, before an impartial hearing officer, and with the right to examine HUD personnel. The hearing officer was a HUD official who refused to permit the questioning of HUD personnel. The "hearing" was limited to the Owner's presentation of facts pertinent to a comparability analysis.

4. Owner hired Core Beamster, market research director and appraiser with Shorett & Riley, Seattle, Washington, to examine what materials were available involving the methodology used by HUD to conduct its comparability analysis. Mr. Beamster was also asked to perform his own comparability analysis according to conventional appraisal techniques.

5. The pictures on the next page are of the Project and one of the "comparables" selected by HUD.

SECTION 8 APARTMENTS

HUD'S "COMPARABLE"

6. Mr. Beamster concluded that the comparables used by HUD, which were personally inspected by Mr. Beamster, and the apparent methodology used by HUD for making adjustments to account for the additional amenities of the Project (i.e. location, view, elevators, interior corridors, age, condition, recreational areas, construction design, square footage etc.), were "farcical" and a "perfunctory exercise" that did not "fairly represent an honest methodology."

7. The analysis prepared by Mr. Beamster according to conventional appraisal techniques, using other high-rise apartments in Tacoma, Washington, as comparables, indicated that the current contract rents were squarely within the rental range that would be expected in the Tacoma market. The adjusted rents determined by HUD were substantially below the market.

/s/ Donald W. Hanford

SUBSCRIBED AND SWORN TO before me this 6th day of March, 1987.

Seal

/s/ Janet L. Hill
Notary Public in and for
the State of Washington,
residing at Tacoma.
My commission expires
5-22-90

APPENDIX B

SECTION 8(c)(2) OF THE UNITED STATES HOUSING ACT OF 1937 (as originally adopted)

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as herein before provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

APPENDIX C

SECTION 8 CONTRACT RENT ADJUSTMENT PROVISIONS (Typical)

1.9 RENT ADJUSTMENTS

a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Session 1.6a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulate rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

APPENDIX D

24 C.F.R. 888

Subpart B–Contract Rent Automatic Annual Adjustment Factors

AUTHORITY: Sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)); sec. 5(b), U.S. Housing Act of 1937 (42 U.S.C. 1437c(b)); sec. 8, (U.S. Housing Act of 1937 (42 U.S.C. 1437(f))

§ 888.201 Purpose.

Automatic Annual Adjustment Factors are used to adjust rents under the Section 8 Housing Assistance Payments Program.

[44 FR 75383, Dec. 20, 1979]

§ 888.202 Measure of publication.

Adjustment Factors will be published in the FEDERAL REGISTER at least annually by Notice. Interim revisions may be published as market conditions indicate. In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors (see § 888.204).

[42 FR 60508, Nov. 25, 1977, as amended at 44 FR 75383, Dec. 20, 1979; 47 FR 4252, Jan. 29, 1982]

§ 888.203 Use of contract rent automatic annual adjustment factors.

(a) To compute an adjustment to a Contract Rent, find the schedule of Automatic Annual Adjustment Factors for the appropriate Census Region or Standard Metropolitan Statistical Area –

(1) If the Contract Rent includes all utilities, use the factor shown on the basic schedule for the rent bracket within which the particular Contract Rent falls and for the applicable size of unit (by number of bedrooms).

(2) If the Contract Rent does not include all utilities but does include the highest cost utility, use the appropriate factor shown on the basic schedule.

(3) If the Contract Rent does not include any utilities or includes some utilities but not the highest cost utility, use the Annual Adjustment Factor for Contract Rent (Excluding Utilities).

(b) The adjusted monthly amount of the Contract Rent of a dwelling unit shall be determined by multiplying the Contract Rent in Effect on the anniversary date of the contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount.

[42 FR 60508, Nov. 25, 1977, as amended at 44 FR 21769, Apr. 12, 1979; 47 FR 4252, Jan. 29, 1982]

§ 888.204 Revision to the automatic annual adjustment factors.

If the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act of 1937, in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate

than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area. Any request for revision of the factors must be accompanied by an identification of the area, its boundaries and evidence that the area constitutes the largest contiguous area in which substantially the same rent levels prevail. The HUD Field Office will publish appropriate notice of the establishment of any such revised Automatic Annual Adjustment Factors. These factors will remain in effect until superseded by the subsequent publication of Automatic Annual Adjustment Factors pursuant to § 888.202.

[44 FR 21769, Apr. 12, 1979]

APPENDIX E

24 C.F.R. § 880.102 (April 29, 1975)

* * * *

Fair Market Rent.(a) The rent, including utilities (except telephone), ranges and refrigerators, parking, and all maintenance, management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design meeting the objectives of the HUD Minimum Property Standards.

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24 C.F.R. § 880.103 (April 29, 1975)

(a) New construction projects shall be permitted only where: (1) HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing which, with the aid of housing assistance payments provided under the Section 8 Housing Assistance Payments Program – Existing Housing, can meet the needs of Eligible Families, or (2) the proposed project is specifically approved by HUD in accordance with priorities established from time to time by the Secretary including priorities for New Communities.

* * * *

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24 C.F.R. § 880.108 (April 29, 1975)

* * * *

(b) *Reasonableness of Rents.* In any case, the Contract Rents as proposed must be determined by HUD to be reasonable in relation to the quality, location, amenities, and management and maintenance services of the project, and proposed rents shall be subject to reduction if they are found to be higher than such reasonable rents. Appropriate reductions to reflect any savings where tax-exempt financing is involved may be made.

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24 C.F.R. § 880.110(b) and (d) (April 29, 1975)

* * * *

(b) *Automatic Annual Adjustments.* (1) Automatic Annual Adjustment Factors will be determined by HUD at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by HUD where utilities are paid directly by Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by HUD. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the

adjusted rents be less than the Contract Rents on the effective date of the Contract.

* * * *

(d) *Overall Limitation.* Notwithstanding any other provisions of this part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable unassisted unites, as determined by HUD.

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24 C.F.R. § 880.125(e) (April 29, 1975)

* * * *

(e) *Use of Contract as security for financing.* (1) An Owner or financing agency pledge, or offer as security for any loan or obligation, an Agreement or Contract entered into pursuant to this part, and a financing agency may pledge ACC payments as security for housing assistance payments pursuant to the Contract: *Provided, however,* That such security is in connection with a project constructed pursuant to this part, the terms of the financing or any refinancing have been approved by HUD in accordance with this section, and the financing agency has submitted a certification that the terms and conditions of the financing of the particular project are consistent with those specified in the documents which were approved by HUD. Any such pledge shall be limited to the amounts payable under the Contract or ACC in accordance with its terms.

(2) In the event of foreclosure, or assignment or sale to the financing agency in lieu of foreclosure, or in the event of assignment or sale agreed to by the financing agency, and approved by HUD (which approval shall not be unreasonably delayed or withheld), housing assistance payments shall continue in accordance with the terms of the Contract.

APPENDIX F

FED. REG. NOVEMBER 8, 1976 p. 49440

* * * *

These factors were calculated for 23 Standard Metropolitan Statistical Areas (SMSAs) and for the four Census Regions on the basis of changes in the Consumer Price Index (CPI) for rents and utilities that occurred in the last year. *Because of the unavailability of CPI data for all housing market areas, the Department is requesting comments from members of the general public on alternate approaches or data sources which could provide information on smaller sized areas than those being published at this time. Such comments may relate to national or regional data, to methodology, or to limited areas.* (Italics added).

FED. REG. NOVEMBER 25, 1977 p. 60508

* * * *

2. Section 888.202 is being revised to state that additional Adjustment Factors will be published where market conditions indicate a need to publish factors for particular areas.

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24 C.F.R. § 888.202

(as revised November 25, 1977 – revisions italicized)

Schedule C Adjustment Factors will be published in the Federal Register at least annually. Interim revisions may be published as market conditions indicate. *In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors (see Section 888.204).* (Italics added.)

HUD HANDBOOK (MAY 1978)

* * * *

Pursuant to Section 880.110(d), the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither to high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3).

APPENDIX G

HUD HANDBOOK PROVISION (7420.1CHG)

*7-8 ANNUAL AND SPECIAL ADJUSTMENTS TO CONTRACT RENTS AND ADJUSTMENTS TO UTILITY ALLOWANCES.

a. *Automatic Annual Adjustments.*

(1) In accordance with Section 880.110, Automatic Annual Adjustment Factors will be determined by HUD and published in the *Federal Register* at least annually with interim revisions made as conditions warrant. Annual revisions to Contract Rents will be based on the Automatic Annual Adjustment Factors, subject to the overall limitation that Adjustments shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the AHM Branch (*except to the extent that differences may have existed with respect to the initial Contract Rents*), to cover increases incurred since the effective date of the Contract. *Contract Rents shall be adjusted on the anniversary date of each Contract by applying the Automatic Annual Adjustment Factors most recently published by HUD.* For projects with staged completion, the anniversary date for the first stage shall be deemed the anniversary date for all the stages for the purpose of the annual adjustment. The Factors are found in Schedule C of Part 888. In order to undertake this responsibility, the AHM Branch shall maintain the most recent Schedule C. The Area

Counsel shall prepare an amended exhibit to the Contract to reflect changes in the Contract Rents.

(2) The Owner shall submit the revised rent schedule on Forms HUD-52670 and HUD-52670A, based on the application of the Automatic Annual Adjustment Factors, no later than the 20th of the month prior to the anniversary date of the Contract. The revised schedule shall be submitted simultaneously to the AHM Branch and to RAD in the case of a Private-Owner or PHA-Owner Project, and to the PHA in the case of a Private-Owner/PHA Project.

(3) *In accordance with Section 888.203, to compute an adjustment to a Contract Rent, the schedule of Automatic Annual Adjustment Factors for the appropriate Census Region or SMSA is used.* Section 888.203 provides specific instructions on the application of the factors to specific units with or without utilities. The following example assumes a Contract Rent of $200 for a two-bedroom unit in Springfield, Massachusetts (Northeast Census Region):

(a) When the Contract Rent includes *all* utilities, use the *basic schedule:*

$200 x 1.064 = $213

(b) When the Contract Rent does not include all utilities but does include the highest cost utility, use the *basic schedule:*

$200 x 1.064 = $213

(c) When the Contract Rent includes (a) some utilities but not the highest cost or (b) no utilities, use the Annual Adjustment Factor, Excluding Utilities:

$200 x 1.052 = $211

NOTE: All computations shall be rounded to the next higher dollar amount. For example, $209.01 is rounded to $210.

The new Contract Rent for each unit eligible for the adjustment shall be placed on Form HUD-52670A, Part I, Column (5). Accordingly, the new Housing Assistance Payment for each unit receiving the Automatic Annual Adjustment shall be computed by subtracting the Rent Payable by Family, column (6), from the newly-computed Contract Rent, Column (5), and inserting the new Housing Assistance Payment in Column (7).

(4) The AHM Branch (or the PHA in a Private-Owner/PHA Project) shall establish an effective control to ascertain the anniversary date of each Contract. If the Owner submits the Forms HUD-52670 and 52670A, Part 1, with changes reflected by the application of the adjustment factor, the AHM Branch or the PHA shall verify the accuracy of the amounts by referring to Schedule C. Pursuant to Section 880.110(d), *the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the*

AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3). In Private-Owner/PHA projects, the PHA shall be responsible for notifying the AHM Branch of the need to revise the factors. If the anniversary date passes without the Owner reflecting the changes, the AHM Branch or the PHA shall make the appropriate computations and notify the Owner and RAD and, as appropriate, retroactive payments to the Owner may be requested by the Owner and paid.

* * *

APPENDIX H

100TH CONGRESS) HOUSE OF (REPORT
1st Session) REPRESENTATIVES (100-122

HOUSING, COMMUNITY DEVELOPMENT, AND HOMELESSNESS PREVENTION ACT OF 1987

JUNE 2, 1987.–COMMITTED TO THE COMMITTEE OF THE WHOLE HOUSE ON THE STATE OF THE UNION AND ORDERED TO BE PRINTED

MR. ST GERMAIN, from the Committee on Banking, Finance and Urban Affairs, submitted the following

REPORT

together with

MINORITY, SUPPLEMENTAL, AND ADDITIONAL VIEWS

[To accompany H.R. 4]

The Committee on Banking, Finance and Urban Affairs, to whom was referred to the bill (H.R. 4) to amend and extend certain laws relating to housing, community and neighborhood development and preservation, and shelter assistance for the homeless and displaced, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * *

Section 8 rent adjustments

When it enacted the Sec. 8 program, Congress intended that rents for project-based assisted projects would be reduced only if the published Automatic Annual Adjustment Factor ("AAAF") was negative; reflecting a noticeable general downturn of rents in the market area. Although no negative adjustment factors have been published to date, HUD field offices have been making capricious individualized rent reductions nonetheless. Further, such reductions and other rent limitations have been made on an ad hoc and arbitrary basis in the absence of published procedures that could assure a consistent policy. To eliminate these arbitrary practices not justified under current law, Sec. 142(d) prohibits reductions in rents in effect on or after April 15, 1987, unless the project has been refinanced and the monthly mortgage payments have been reduced.

* * *

APPENDIX I

EXCERPTS FROM CONGRESSIONAL RECORD

Senator Sasser (Chairman Budget Committee):

Mr. President, I would like to enter into a colloquy with the chairman of the Subcommittee on Housing and Urban Affairs to *clarify the intent of the legislation* with respect to Section 801, "annual adjustment factors for Section 8 rent."

At the outset, I would like to offer my congratulations to the chairman for addressing the very complex situation surrounding the *Rainier View* decision. Indeed, by moving quickly to enact this legislation with its *Rainier View* "fix" we could save the Government hundreds of millions, if not more than a billion dollars.

-Cong. Rec. S 16607 (Nov. 21, 1989).

Senator Cranston (Chairman Housing Subcommittee):

The Administration placed the cost of compliance with the Court of Appeals' decision at $600 million to $1 billion. The Administration estimates that the cost of this retroactive solution is $210 million nationwide.

-Cong. Rec. S 16600 (Nov. 21, 1989).

Senator D'Amato (Ranking Minority Member, Housing Subcommittee and Co-sponsor of Bill):

The provision in this bill reduced this loss to $210 million – a savings of over $390 million.

-Cong. Rec. S 16602 (Nov. 21, 1989).

Representative Gonzalez (Chairman Housing Subcommittee):

The resolution would reduce retroactive costs to $210 million and reduce prospective costs to $500 million over 10 years.

-Cong. Rec. H 9686 (Nov. 21, 1989).

Representative Wylie (Ranking Minority Member, Housing Subcommittee):

These issues include a provision regarding the methodology for HUD to use in determining Section 8 project rent adjustments made necessary by the Rainer View court decision . . . It too will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million.

-Cong. Rec. H 9690 (Nov. 21, 1989).

Secretary Kemp (in letter to Congress):

Although the final bill does impose a greater retroactive settlement cost than I had proposed, it does provide the essential legislative relief to avoid a potential loss of $2 billion at a cost of less than $250 million.

-Cong. Rec. H 9688 (Nov. 21, 1989).

APPENDIX J

EXCERPTS FROM OWNERS' LETTERS

From An Owner In Seattle, Washington:

"In early March of 1975 I attended an in-depth briefing of the Section 8 program at NAHB headquarters in Washington, D.C. This briefing was jointly sponsored by NAHB and HUD.

"Larry Simons, then FHA Commissioner and Deputy HUD Secretary for Housing, presented the view from HUD.

"He presented the Section 8 program as a program completely devoid of the problems of the failed Section 236 program in that HUD would have the private sector develop, own and manage conventionally financed projects with HUD supplying tenant subsidy by way of a project contract. The key factor to be considered, according to Simons, was that HUD would not interfere with the project income but would make *automatic* annual adjustments to the rental rate. The automatic adjustment would be based on a published factor for selected geographic areas.

"For several years HUD lived up to their part of the Section 8 contract: did not interfere and adjusted rental rates in accordance with published AAAF's. In 1981, I believe, the tinkering started with AAAF's and HUD's attempt to limit AAAF's to application to operating costs only. This was the first step to HUD creating a 236 monster out of a good Section 8 program.

"In retrospect, the developer/builders who committed the excellent sites to house low income elderly (whose sin is being poor) and who honored

the Section 8 contracts on a long range basis are the fools of Section 8 program."

From An Owner In Tacoma, Washington:

"The economic impact of this new law on me, as a Section 8 owner, is the same as the economic impact that we have endured throughout most of the life of this program with regard to the projects that I own. We built these projects in 1980. We spent a portion of 1978, all of 1979, all of 1980 and through 1981, getting our projects planned, built, and rented up. This represents a significant period of time in a person's economic life. We made the decision to spend the time on these projects, because HUD represented to us that this program was to be a program which was a mirror of the market for conventional units. In other words, we would be able to enjoy the same rent increases throughout the life of this project as we would if we were building a conventional project. Also, we assumed then that we would be able to enjoy the same increases in value of our projects throughout the term of the HAP Contract. This has not been the case, and if this new law is allowed to take effect, will continue to not be the case.

"I've had it with this program and with HUD in general. If I had done business with any private individual who made the representations to me about any private program, in order to induce me to participate in the program, I would have been able to sue that individual for fraud and prevail, causing him to either buy the project or pay substantial damages, compensating me for the time and the lost economic opportunities that I missed

as a result of spending time creating these projects."

"When the Section 8 Program was introduced, HUD officials represented that this program was the program that was going to end all of the frustrating, bureaucratic machinations that we had to go through under the 236 Program. Our rent increases were to be automatic. They were to be tied to the consumer price index and to be an absolute mirror of the conventional apartment market. This was simply not true.

"These programs have been every bit as frustrating as the old Section 236 Programs. I don't know of any of my acquaintances who are involved in a Section 8 Program, who would have signed up for these contracts and built these projects, had they been told of the way in which they would be treated throughout this program. The Department of Housing and Urban Development lured us into these programs with misrepresentations as to how they would be administered. If any contract between two private parties had been breached, in the way that our Section 8 contracts have been breached, the party in default would have been required by the courts to pay damages long ago. I don't understand why HUD seems to be able to operate without regard to the laws of our land and get away with it."

From An Owner In Dubuque, Iowa:

"Our costs of building St. Mary's Apts. were 140% higher than conventional construction due to the Federally mandated requirement to build under the Davis-Bacon Law. However, over a

period of time, these increased costs were expected to be retrieved through adjusted annual rents. The change in the law and the direction that HUD is taking definitely nullifies my expectations of recouping the tremendous added costs of construction under the Davis-Bacon Law. The revised law will reduce our annual income on a continuous basis. . . . The future viability of this type of property is certainly on the line. Further, with diminishing return, we have less ability to refinance the project now or in the future."

From An Owner In Ames, Iowa:

"Changing the requirements that HUD agreed to follow substantially effects the marketability and profitability of these projects. Obviously a reduction of anticipated income grossly effects the market value of each project. Due to past experience with HUD, we now have no confidence in what to expect for rental rates in the future. . . . This uncertainty over rental rates makes the Section 8 projects a poor investment and greatly reduces their market value."

From An Owner In Everett, Washington:

"Our development company has little interest in participating with HUD again in providing low income housing and this lack of interest is shared by many other developers and owners. HUD has proven its inability to provide and maintain low income housing without private sector involvement. In fact, HUD's history for the last eight years has been that the only housing they can build is mansions with swimming pools and

jacuzzis for consultants with the proper political connections."

From An Owner In June Lake, California:

"Without the rent increases we have virtually no cash flow. Without some positive cash flow, we have an unsalable project."

From A Property Manager In Seattle:

"The impact of this proposed law will make it difficult for our buildings to carry themselves. Real estate taxes and other expenses are going up every year. Without a 5 to 6% increase in rents, I don't see how they could keep pace with the increased expenses. This new law would put Section 8 owners at a disadvantage. We are finally getting to a position where there is a return on our original investments.

"All in all we feel that if the new law goes into effect our buildings will suffer greatly and not be able to meet their expenses."

From A Property Owner In Minnesota:

"It seems to me . . . that HUD struck a bargain and drew a contract with private owners into which neither party knew what the eventual outcome would be. When it appears that using comparability would save money, even though it was never part of the original contract, HUD saw fit to change the rules both unilaterally and arbitrarily. When challenged, HUD characterized fulfillment of the contract as 'windfall.'

"There are times that we as citizens need to point out the hypocrisy of your stance. When contract law is not honored by our government, then carried to an extreme position, we need to act as Eastern Europeans finally did in their countries.

"I wonder what stance HUD would take if the Automatic Adjustment would have been less costly and the private owners had argued for comparability studies."